IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. THOMAS HOPSON, Appellant.	No. 37540-1-II UNPUBLISHED OPINION

Van Deren, C.J. — Thomas Hopson appeals his sentences for residential burglary and second degree theft. He argues that the trial court improperly included out-of-state convictions in his offender score when it sentenced him to 57 months' confinement on the residential burglary conviction and 14 months on the second degree theft conviction He argues that the other state's statutes were not comparable to Washington's burglary and bail jumping statutes and, therefore, the out-of-state convictions should not count in his offender score. The State concedes that the out-of-state bail jumping conviction should not have been counted. We remand for resentencing without allowing additional evidence to be presented.

FACTS

Hopson was charged with residential burglary, count I, and second degree theft, count II,

for the August 18, 2007, theft of an online multiplayer and digital media delivery service unit from a residential apartment. At trial, Hopson moved to suppress evidence of his prior convictions under ER 609 and ER 404(b). In particular, Hopson argued that evidence of a 1995 Wisconsin burglary conviction should not be admitted because "any probative value is outweighed by the prejudicial effect" and because the conviction was more than ten years old. 1 Report of Proceedings (RP) at 5-6.

The prosecutor argued that evidence of Hopson's previous burglary conviction was admissible under ER 609 because "burglary is a crime of dishonesty" and because Hopson had been released fewer than 10 years before the charges arose in this case. 1 RP at 5. The prosecutor noted on the record that he "ha[d] certified copies of [Hopson's] prior convictions." RP (Jan. 16, 2008) at 6. Copies of the certified judgments and sentences are not included in the record on appeal. The trial court reserved ruling on the issue of the exclusion of Hopson's burglary conviction.

On January 22, a different judge presided over the trial and took up the issue of Hopson's motion to exclude evidence of his prior convictions. The trial court asked the prosecutor if he had a certified record of the convictions, to which the prosecutor responded, "Yes, I do." 1 RP at 4. The prosecutor further explained:

> The only prior conviction the state is asking the court to admit under Evidentiary Rule 609 is the burglary conviction.
>
> . . . I'll hand forward a copy of the judgment and sentence from the State of Wisconsin. You will notice where it's checked and highlighted.
>
> . . . And if you look at the second page of the judgment and sentence, you can see where the defendant, in his own handwriting, basically says they broke into a building to steal things.

1 RP at 4-5.

Hopson disagreed that his handwriting was on the plea form, "I believe that was filled out by either the prosecutor or perhaps [Hopson's] defense attorney. The plea forms there from '95 are a little different than what ours are."[1] 1 RP at 6. Hopson continued:

> In addition, my concern would be that this is from Wisconsin. On the first paragraph, it says that as a party to a crime he intentionally entered a building, and "dwelling" is crossed off. A dwelling is equivalent, I believe, to potentially a residential burglary in Washington. However, entering into a building is more akin to a criminal trespass. And I would argue that that's not the same statute or an equivalent of residential burglary in Washington and should also be excluded for that reason.

1 RP at 6. The prosecutor responded, "Under Washington State law, whether it's a residence or whether it's a building, if you enter that building with the intent to commit a crime, that's a burglary. That's exactly what we have in the criminal complaint from Wisconsin." 1 RP at 7.

The trial court ruled that the Wisconsin burglary would be admissible to impeach Hopson under ER 609, stating:

> [T]he Wisconsin conviction for burglary does appear to track with the Washington State statute on burglary as well, so it would appear to be the same crime in that situation under Washington law. It does involve dishonesty or false statement. And it appears that although the judgment and sentence was dated January 19, 1996, it was for a prison sentence of 36 months, which would mean that it would be within the ten years, under Evidentiary Rule 609(b), from the release of [Hopson] from confinement imposed for that conviction. Therefore, I will deny the request to exclude the defendant's prior burglary conviction.

1 RP at 7-8.

A jury found Hopson guilty on both counts. At sentencing, Hopson raised the issue of whether the Wisconsin burglary conviction was comparable to a burglary conviction in Washington, "[W]e do not agree that it's a burglary equivalent. I would say, at best, it's more

[1] The State recanted its statement that the notation was in Hopson's handwriting after Hopson objected.

akin to a criminal trespass, and we would ask Your Honor to consider not counting that, in addition to not counting it [for two points]." 4 RP at 186. The prosecutor countered:

> [T]his court has already ruled that that burglary is equivalent to a burglary in the State of Washington. And to refresh the court's memory, [Hopson], in his plea form, admitted that [he] forcibly entered a building through the back door and stole things. That's a burglary in Washington State, and that's a felony. It's not a criminal trespass.

4 RP at 189. Hopson also argued that a prior bail jumping conviction from Wisconsin should not be included in his offender score because the Wisconsin bail jumping statute included failure to pass a urine test as grounds for conviction for bail jumping, while the Washington bail jumping statute only includes a defendant's failure to appear in court.

The trial court determined that all of Hopson's Wisconsin convictions, including the burglary and bail jumping convictions, would be counted in calculating his offender score. It stated, "With regard to the 1996 Milwaukee, Wisconsin, burglary conviction, I previously ruled that was the equivalent of a burglary conviction in the State of Washington and I will be maintaining that for purposes of sentencing as well." In ruling that Hopson's Wisconsin bail jumping charge would be counted, the trial court stated, "The issue is whether the bail jumping is an equivalent to the bail jumping in the State of Washington. The court finds that it is, even though a person in Wisconsin could be charged with bail jumping if they violated other conditions of bail as well." 4 RP at 191-92.

The trial court calculated Hopson's offender score as 7 for the residential burglary and 6 for the second degree theft, because the Wisconsin burglary conviction added 2 points to the burglary conviction and 1 point to the second degree theft conviction. The trial court sentenced Hopson to 57 months' incarceration on count I, residential burglary, and to 14 months on count

II, second degree theft.

Hopson appeals.

ANALYSIS

Hopson argues that "[t]he State failed to prove the comparability of [his] Wisconsin convictions for burglary and bail jumping."[2] Br. of Appellant at 4. He further argues that, on remand, the trial court should only consider the evidence contained in the existing record in determining his sentence. Finally, Hopson argues in his statement of additional grounds for review (SAG)[3] that the trial court violated his right to a speedy trial. We remand for resentencing based on the existing record.

I. Offender Score Calculation

Hopson argues that it was error for the trial court to include the Wisconsin burglary conviction in his offender score. The trial court included it "because it had ruled during trial that the offense was admissible to impeach his testimony" but Hopson argues that the inquiry for admissibility as impeachment evidence is different than the inquiry to determine whether a conviction should be considered in calculating an offender score. Br. of Appellant at 6-7. He argues that the Wisconsin burglary statute is not comparable to the Washington statute and, therefore, the burglary conviction should not have been included in his offender score.

The State argues that, even if the Wisconsin statute is broader than the Washington statute, Hopson's sentence should be upheld. It points to *State v. Morley*, which states that

---

[2] Hopson also argues that the State failed to prove the comparability of his Wisconsin bail jumping conviction. The State concedes "that it failed to prove below that the Wisconsin bail jumping statute is comparable" to Washington's. Br. of Resp't. at 9. We accept the State's concession and only consider the burglary statute based on our own review of the record.

[3] RAP 10.10.

where the out-of-state statute is too broad to compare directly with the Washington statute, "'the sentencing court may look at the defendant's conduct, as evidenced by the indictment or information, to determine whether the conduct would have violated the comparable Washington statute.'" 134 Wn.2d 588, 606, 952 P.2d 167 (1998) (quoting *State v. Mutch*, 87 Wn. App. 433, 437, 942 P.2d 1018 (1997), *overruled by State v. Freeburg*, 120 Wn. App. 192, 84 P.3d 292 (2004)). The State argues that "an examination of the facts, and the specific portion of the statute [Hopson] pled guilty to, shows that the Wisconsin conviction is factually comparable to Washington's second degree burglary statute." Br. of Resp't at 8.

A. Standard of Review

"We review a sentencing court's calculation of an offender score de novo." *State v. Bergstrom*, 162 Wn.2d 87, 92, 169 P.3d 816 (2007). The Sentencing Reform Act of 1981, chapter 9.94A RCW, sets out standard sentencing ranges based on "the defendant's offender score and the seriousness level of the crime." *State v. Wiley*, 124 Wn.2d 679, 682, 880 P.2d 983 (1994); RCW 9.94A.530. Generally, an offender score is calculated by adding together prior felony convictions. RCW 9.94A.525.

B. Comparability Analysis

"Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law." RCW 9.94A.525(3). "To properly classify an out-of-state conviction according to Washington law, the sentencing court must compare the elements of the out-of-state offense with the elements of potentially comparable Washington crimes." *State v. Ford*, 137 Wn.2d 472, 479, 973 P.2d 452 (1999).

If an out-of-state conviction is not identical to a Washington statute, "or if the Washington

statute defines the offense more narrowly than does the foreign statute," the trial court can look at the record of the out-of-state conviction "to determine whether the defendant's conduct would have violated the comparable Washington offense." *Ford*, 137 Wn.2d at 479; *State v. Collins*, 144 Wn. App. 547, 553-54, 182 P.3d 1016 (2008), *review denied*, 165 Wn.2d 1032 (2009). In order to consider the facts of the out-of-state conviction for this purpose, however, the trial court may only consider facts that "have been admitted or stipulated to or proved to the finder of fact in the foreign jurisdiction beyond a reasonable doubt."[4] *Collins*, 144 Wn. App. at 554. "The State bears the burden of proving the existence of prior convictions by a preponderance of the evidence." *Bergstrom*, 162 Wn.2d at 93.

"[I]n order to prove criminal history, the State must provide a certified copy of the judgment and may introduce other comparable evidence only if the certified copy is unavailable through no fault of the State." *State v. Mendoza*, 139 Wn. App. 693, 707, 162 P.3d 439 (2007), *aff'd*, ___ Wn.2d ___, ___ P.3d ___, 2009 WL 1014617 (Apr. 16, 2009). But "[s]entencing courts can rely on the defense acknowledgment of prior convictions without further proof." *Bergstrom*, 162 Wn.2d at 94.

C. Second Degree Burglary

In Washington, "[a] person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle or a dwelling." RCW 9A.52.030(1). Hopson was apparently convicted under Wisconsin statute section 943.10, which states:

[4] "Otherwise, the attempt in Washington to examine the underlying facts of the foreign conviction will prove problematic 'because there may have been no incentive for the accused to have attempted to prove that he did not commit the narrower offense.'" *Collins*, 144 Wn. App. at 554 (quoting *In re Pers. Restraint of Lavery*, 154 wn.2d 249, 257, 111 P.3d 837 (2005)).

> Whoever intentionally enters any of the following places without the consent of the person in lawful possession and with intent to steal or commit a felony in such place is guilty of a Class F felony:
>
> (a) Any building or dwelling; or
>
> (b) An enclosed railroad car; or
>
> (c) An enclosed portion of any ship or vessel; or
>
> (d) A locked enclosed cargo portion of a truck or trailer; or
>
> (e) A motor home or other motorized type of home or a trailer home, whether or not any person is living in any such home; or
>
> (f) A room within any of the above.

Wis. Stat. § 943.10(1m).

Because the Washington statute expressly limits second degree burglary to entry into "a building other than a vehicle or a dwelling," whereas the Wisconsin statute includes dwellings, railroad cars, ships and vessels, trucks, and trailer homes, the Wisconsin statute is clearly broader than the Washington statute. In addition, as pointed out by the State, the Washington statute restricts second degree burglary to persons who enter buildings "with intent to commit a crime against a person or property therein," while the Wisconsin statute includes any person who "intentionally enters . . . with intent to steal or commit a felony." RCW 9A.52.030(1); Wis. Stat. § 943.10(1m). Because a person can intend to commit a felony without intending to commit a crime against a person or property, the Wisconsin statute is broader than the Washington statute.

A copy of the paperwork on Hopson's Wisconsin conviction is not part of the record.[5] Therefore, the only evidence available to us is the trial transcript to determine whether Hopson stipulated to sufficient facts in pleading guilty to burglary in Wisconsin to show that his actions would have violated the Washington second degree burglary statute.

[5] The State notes in its brief that "[t]he parties examined the certified record" of the Wisconsin conviction during trial, but concedes that it "could not locate a copy of the certified judgment." Br. of Resp't at 8 n.3.

During the January 22 pretrial hearing on the issue of admissibility of evidence of the Wisconsin burglary conviction at trial, the prosecutor referred to the judgment and sentence on Hopson's Wisconsin conviction, indicating that the judgment and sentence documents were apparently available at trial in this matter. The prosecutor stated, "if you look at the second page of the judgment and sentence, you can see where [Hopson], in his own handwriting, basically says they broke into a building to steal things." 1 RP at 5. Hopson stated, "On the first paragraph [of the plea form], it says that as a party to a crime he intentionally entered a building, and 'dwelling' is crossed off." 1 RP at 6.

Because we do not have access to the judgment and sentence, we hold that the transcript evidence is insufficient for our review of the trial court's finding that Hopson's Wisconsin conviction for burglary would also be a felony under Washington law. Thus, we remand for resentencing.

II. Evidence on Remand

Hopson argues that

> [i]f the erroneous inclusion of out-of-state convictions results in an unlawful sentence, and the defendant fully argued the disputed issues to the sentencing court, the Court of Appeals will hold the State to the existing record, excise the unlawful portion of the sentence, and remand for resentencing without allowing further evidence to be adduced.

Br. of Appellant at 13.

The State argues that, in the event we determine that there are insufficient facts in the record to determine the comparability of the Wisconsin burglary conviction and the Washington burglary statute, "this court [should] remand to the trial court to examine only those documents that were before it at the time [] the original determination was made, and make the factual

determination part of the record." Br. of Resp't at 9. We agree.

In *Ford*, the Washington Supreme Court found that "the evidence is insufficient to support the conclusion that the disputed convictions would be classified as felonies under Washington law" and it held that resentencing was required. 137 Wn.2d at 485. It stated, "In the normal case, where the disputed issues have been fully argued to the sentencing court, we would hold the State to the existing record, excise the unlawful portion of the sentence, and remand for resentencing without allowing further evidence to be adduced." *Ford*, 137 Wn.2d at 485. But the *Ford* court held that defense counsel had failed to properly raise the issue at trial. Therefore, in an effort to prevent future defendants from "purposefully fail[ing] to raise potential defects at sentencing in the hopes the appellate court will reverse without providing the State further opportunity to make its case," the court held that "where, as here, the defendant fails to specifically put the court on notice as to any apparent defects, remand for an evidentiary hearing to allow the State to prove the classification of the disputed convictions is appropriate." *Ford*, 137 Wn.2d at 485-86.

Our Supreme Court reiterated this holding in *State v. Lopez*, 147 Wn.2d 515, 55 P.3d 609 (2002). In *Lopez*, the court held that "a remand for an evidentiary hearing is appropriate only when the defendant has failed to specifically object to the State's evidence of the existence or classification of a prior conviction." 147 Wn.2d at 520.

Here, Hopson properly raised the issue of his prior convictions during sentencing. The State bears the burden of proving prior convictions. *Bergstrom*, 162 Wn.2d at 93. Because the issues have been fully argued to the sentencing court, we hold the State to the existing record, vacate the unlawful portion of the sentence, and remand for resentencing without allowing further

evidence to be presented. *Ford*, 137 Wn.2d at 485. This evidence would presumably include the Wisconsin judgment and sentence that were not made part of the record on appeal, but which were clearly before the trial court and both parties at the pretrial hearing.

III. Statement of Additional Grounds for Review

In his SAG, Hopson argues that the trial court violated his speedy trial rights. He argues that "on 01-8-08 [he was in the] Culpepper court [and the court] asked the prosec[u]t[or] ['']what are you going to do with [Hopson's] case[?]It [is] 91 days old.['']" Hopson alleges that the trial court asked Hopson if he had anything to say, and he replied, "['Y]es I do[.] I w[ou]l[d] like [] the court to dismiss the case[.']" SAG at 1. Hopson states in his SAG that the trial court continued the case for one day. He then notes that his attorney was not present in court on January 8.

Hopson states that he did not receive a transcript for the January 8 hearing. We also did not receive a transcript for the hearing and no such transcript is contained in the record on appeal. Because we cannot consider facts not contained in the record, we must decline to consider Hopson's speedy trial argument. *State v. Lough*, 70 Wn. App. 302, 335, 853 P.2d 920 (1993), *aff'd*, 125 Wn.2d 847, 865, 889 P.2d 487 (1995).

We remand Hopson's conviction for resentencing to exclude consideration of the Wisconsin bail jumping conviction and to include the evidence available to the trial court when it

made its comparability determination.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, C.J.

We concur:

Quinn-Brintnall, J.

Penoyar, J.